> Of all the checks on democracy, federalism has been the most efficacious and congenial . . . it is the only method of curbing not only the majority but the power of the whole people.
>
> Lord Acton

> The wider the range of activities covered by the market, the fewer are the issues on which explicitly political decisions are required.
>
> Milton Friedman

1. Introduction

The ascendancy and the sprawl of neoliberalism in recent decades has been met with many declarations of ends: the end of the welfare state and social democracy;[1] the end of the law (ended either by a lawlessness hitched to capital *or* by an infestation and subordination of the law by neoliberal instrumentalization *or* by some sequential combination of the two);[2] the end of non-market ends;[3] and the end of liberal democracy.[4] One is tempted by an array of political facts to affirm the rightness of these declarations. How easy it is to imagine the end of the law at the hands of neoliberalism, for example, with the fast rise of law and economics as an adjudicatory rationale, with the rapid proliferation of conjoined J.D./M.B.A programs (rather than J.D.s earned in conjunction with graduate degrees in divinity or ecology or political philosophy), with the emergence of the most "business friendly" Supreme Court in three or four generations,[5] and perhaps most notoriously with the transformation of corporate power into juridical personhood in First Amendment jurisprudence.[6]

But it is with this litany of professed neoliberal ends that the principal opinions in the landmark constitutional case of *N.F.I.B v. Sebelius* (2012) break: one break being intentional (in affirming democratic power over the market), the other break being ironic in its consequences and unintended in its origin (in weakening the necessary coercive power of the neoliberal state in the name of neoliberal freedom).[7] Moreover, the legislation that gave rise to the litigation of the case also signals, in key parts, a welcome departure from the logics of neoliberalism. Against the neoliberal trifecta of "deregulation, privatization, and withdrawal of the state" from social welfare,[8] the Affordable Care Act [ACA], colloquially known as "Obamacare," stands as a rebuttal with its renewed regulation, redistribution, and welfare-state expansion in the service of more accessible health insurance and medical care. The ACA intensifies regulation of the private insurance industry by mandating a higher percentage of expenditures be spent on providing care and by blocking insurance companies from denying individual coverage based upon pre-existing conditions. Private insurance survives, but the logic of privatization is unwound via a redistributive regime of subsidies for those purchasing insurance on the newly created and regulated insurance exchanges. Perhaps most importantly, the law produces the largest expansion of Medicaid since its inception in 1965. The law extends Medicaid eligibility to

adults earning up to 138% of the poverty line. Of those without insurance at the passage of the ACA, over 50% are now eligible for coverage under Medicaid.[9]

This expansion of the welfare state in the provision of health care should be read as something other than "compensatory social policies"[10] for neoliberal policy failures or as a sign of liberalism's limits, and instead be reconsidered as a critical component of a variety of emancipatory political projects, including partial emancipation from the scene of wage labor and its constitutive dominations and exploitations, and also queer emancipation from material dependency upon the biological family. Before thinking more closely about the legislation, let us turn first to the constitutional case that only barely, and against the odds, saved it.

2. The Jurisprudence of *N.F.I.B v. Sebelius*

The case of *N.F.I.B. v. Sebelius* centered upon a contestation over the meaning of two constitutional provisions: the Commerce Clause (Congress' power to mandate the purchase of health insurance by individuals) and the Spending Clause (Congress' power to compel the States to accept conditions upon receiving expanded Medicaid funds). The Supreme Court split deeply on both issues. A shifting majority limited the Federal Government's power on both fronts, but the 5th vote in the case, Chief Justice John Roberts', rescued the individual mandate via the taxing power and preserved the potentiality of Medicaid expansion but without its primary enforcement mechanism.[11] That unexpected threading of the needle proved indispensable for the survival of the ACA, but theoretically it is less interesting than the chasm between two visions that emerged on the Court between Justice Ginsburg on the one hand and the joint dissent of Justices Scalia, Kennedy, Thomas, and Alito on the other.[12]

This chasm represents a reopening of the great constitutional battles of the New Deal era. In the early twentieth century the Supreme Court invoked multiple constitutional provisions to curb social welfare legislation. For example, when individual States established limits on the hours of labor in a workweek, the Court declared that such laws violated the "liberty of contract" possessed by both employer and employee, or more accurately by "master" and "servant."[13] And when the Federal Government attempted to prohibit the transportation and sale of goods produced by child labor, the Supreme Court held that the Commerce Clause should be interpreted narrowly so as to deny Congress this regulatory power.[14] Following this path, the Court transformed the economic crisis of the Great Depression into a constitutional crisis of first rank when it struck down a federal law regulating the hours (setting a maximum) and wages (establishing a minimum) in the coal industry on a juridically invented distinction between "production" and "commerce." The Court reasoned that since the law regulated the site of production it was not really in the government's power to regulate because commerce, according to this theory, only begins after production.[15] With political pressure and new Roosevelt-appointed jurists on the bench, the Court reversed positions in the late 1930s-early 1940s and affirmed the basic architecture of the modern regulatory state.[16]

Justice Ginsburg's opinion in *Sebelius* harkened back to this era of constitutional history. First, Justice Ginsburg eschewed a narrow legal formalism (as to an imagined formal line

between economic activity/inactivity with regard to the individual mandate) and reminded the Court of a legal realist tradition that centered “practical” considerations and “actual experience” at the heart of Commerce Clause jurisprudence.[17] Experience alone, however, can offer no guide for judgment unless there is a normative commitment by which to measure that experience against. “Practical considerations” could easily be tethered to neoliberal ends. However, Justice Ginsburg understood democracy to be pitted against free-market fundamentalisms and sought to preserve the power of “the people’s representatives” to pass social and economic regulation.[18] In a second and related turn against neoliberal rationality and to New Deal-era history, Justice Ginsburg warned of a return to a period when the Supreme Court “routinely thwarted Congress’ effort to regulate the national economy in the interest of those who labor to sustain it.”[19]

In the wake of a long tradition of a critique of rights one can forget the first “right” of democracy is the collective right to govern. Of course rights-based politics can generate a logic of atomization, and it is true that even the right of democracy has been imagined in hyperindividualistic terms, as with the Supreme Court’s established principle of “one person, one vote.”[20] Yet, the Declaration of Independence, in theoretical contrast to the Bill of Rights, declared the “unalienable Rights” of liberty and happiness in terms that prioritized collective political action rather than individual claims to this or that right, including the right to property or even security.[21] Tyrants do not threaten property, they threaten self-government; tyrants do not threaten the individual qua individual, they disestablish the conditions of assembly and rule.[22] Right cannot be exhausted by singularity even if singularity must be a component of the concept of juridical right.

In conjunction with the critique of rights as too individualistic is the critique of rights as too immaterial and thus divorced from the corporeal inequalities of everyday life; such a disjunction in fact secures these inequalities. Marx’s early critique of the constitutional state exemplifies, if not inaugurates, this perspective: “the consummation of the idealism of the state was at the same time the consummation of the materialism of civil society . . . political life declares itself to be only a *means*, whose end is the life of civil society.”[23] More precisely, in his reading of the Declaration of Rights of Man and certain 18th century constitutional provisions of the various US states, Marx argued that property in particular stood at the center of “civil society” and that this is what the concept of rights built a fortress around. Contemporary skeptics of the “rights-revolution” of mid-20th century jurisprudence developed and deepened both lines of thinking, seeing the turn to rights as a turn away from collective power and incapable of confronting the political facts of capital.[24]

Many are unaccustomed to thinking of the Commerce Clause as vital wellspring of democratic political power, a primary constitutional source of the right to democracy, but the peculiarities of the US Constitutional tradition have rendered it so. It is important that the "right" of those who labor endorsed by Justice Ginsburg is envisioned as a collective right, the right of labor as labor to govern the material conditions of their existence. It is a right to power rather than an individualized shield from it; thus it revives a strand of New Deal thinking that, at least partially, engages with the critique of rights in early Marx even while, admittedly, not addressing the logics of production in later Marx. It exceeds our narrowed understanding of current liberal

politics if liberalism is understood as primarily an order of rights against political power rather than as a claim to it, and it is a conceptualization of democracy that neoliberalism works with fury and force to disembowel.[25]

Despite the important shifts in constitutional law during the 20th century that Justice Ginsburg draws upon in *Sebelius*, the Constitution of the United States is no friend of democracy. The Constitution deliberately thwarts the coming together of democratic power by dispersing it temporally and institutionally, and it secures these anti-democratic tendencies by erecting high barriers to constitutional change via normal democratic processes.[26] Thus it is no surprise that Milton Friedman turns to the US Constitution as a model for protecting neoliberal "freedom" from the unfreedom heralded by the presence of democratic political power:

> How can we benefit from the promise of government while avoiding the threat to freedom? Two broad principles embodied in our Constitution give an answer that has preserved our freedom so far . . . First, the scope of government must be limited. Its major function must be to protect our freedom both from the enemies outside our gates and from our fellow citizens . . . The second broad principle is that government power must be dispersed. If government is to exercise power, better in the county than in the state, better in the state than in Washington.[27]

In their dissenting opinion, Justices Kennedy, Scalia, Alito, and Thomas sought to nullify the ACA in its entirety and vindicate these two constitutional principles. They repeatedly returned to the "structural protections" of liberty, "notably the restraints imposed by federalism and the separation of powers." [28] For them, the mandate was unconstitutional because it *compelled* economic activity rather than regulated it, and thus portended the transformation of the Commerce Clause into a general power to solve national problems.[29] The threat to withhold all federal Medicaid funding from States that did not agree to expand their programs in accord with the federal statute raised the specter of Congress "trampling on State's sovereignty" and degenerating into a dreaded "parliament of the whole people."[30] Rather than defer to democratic power in the realm of social and economic welfare legislation, the dissent imagined the role of the Court as stern schoolmaster of the Republic:

> Structural protections . . . are less romantic and have less obvious a connection to personal freedom than the Bill of Rights of the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise . . . Today's decision should have vindicated, should have taught, this truth.[31]

Neoliberal citizens are, apparently, ignorant and stubborn, and in need of constant reminders and tutorials that the acquisition of their individual freedom demands the surrender of their political power.

In light of the dissent's constitutional theory, how then does this constitute a departure from neoliberal ends? Recall that Milton Friedman's hostility to centralized political power offered a gradation of judgment about governmental power when governmental power was

called for: county rather than state, state rather than federal. Unlike Medicare, which is administered by the Federal Government, Medicaid is a joint-project between the States and Federal Government, an example of "cooperative Federalism."[32] Any State could withdraw from Medicaid and leave the poor in grave distress; no action by this or that State can threaten the distribution of health coverage provided by Medicare. And as Justice Ginsburg pointed out, the constitutionality of Medicare is on sound constitutional footing; it does not prod the States, it bypasses them via the Taxing and Spending power. By rendering federal attachments to federal funds constitutionally suspect, the dissent comes near to creating an either/or logic with respect to future Federal action: spend directly or do nothing. When doing nothing ceases to be a political option, nationalized public health care will be the surest legal path; after all, why risk the constitutional challenge when you can simply avoid it? Ironically, the dissent undermines federalism in the name of federalism and thus turns neoliberalism against itself.

Individual liberty and limited government are considered to be neoliberal virtues, but limited government in neoliberal governance in fact means limits in some domains but real and robust power in others. As Wendy Brown has astutely noted, neoliberalism does not fight state power *per se*, but turns state power toward the creation of new neoliberal orders: "the state is not without a project in the making of the neoliberal subject."[33] Chile's simultaneous experience of neoliberalization and right-wing dictatorship helped set the historical mold for realizing Friedman's ordering of economic freedom as preceding and grounding other practices of freedom, and for unleashing the state as a productive force in building a marketized society. Following Brown's lead, we can see that the Pinochet dictatorship did not represent the emergence of a libertarian order of the state policing a naturally functioning market, but instead signaled an active neoliberal state of intervention and social engineering. A key policy triumph of the neoliberals in Chile was the privatization of the public pension system under the Pinochet dictatorship. The minister of labor in charge of that project, José Piñera, would also come to co-chair the Cato Institute's Project on Social Security Privatization in the United States. Chile replaced public pensions with "individually-owned, private investment accounts." The law established a "*mandatory* minimum savings level of 10% of wages" and all "new entrants to the labor force *were required to enter* the PSA system."[34] Workers, however, were 'free to choose' which financial services company they wanted to manage their mandatory individual pension savings account.

To translate this into the language of the *Sebelius* case, the State has issued an individual mandate that all workers must purchase financial services products. The State does not disappear here; it simply appears in neoliberal form. But this appearance is precisely what the right-wing dissent in *Sebelius* held to be constitutionally impermissible. If the State can not only regulate economic "activity" but in fact can *compel* it, have we not then crossed the Rubicon from limited government into its very opposite? As the dissent put it, if the power of regulation includes the power to compel that which is regulated, "then the idea of a limited government power is at an end."[35] The capacity of the Federal Government to privatize Social Security along Chilean lines is thus constitutionally blocked. The dissenting opinion sings with neoliberal poetry only to potentially thwart a longstanding neoliberal dream. It has wandered into that vexing predicament where "neoliberals have never been able to live with, or without, the state."[36]

3. The Welfare-State Left

If neoliberals have never been able to live with or without the state in general, a parallel on the political Left has been its inability to live with or without the welfare state in particular. Even as the welfare state has been under sustained assault, and even as that assault has generated fierce resistance from the Left, it has simultaneously remained an object of leftist suspicion and anti-subordination critique. Those critiques have been indispensable to rethinking what constitutes emancipatory politics and have also contoured the engagements of those politics with the welfare state. Critics have identified the racial exclusions in early Social Security legislation[37]; the gendered norms of many mechanisms and logics of welfare-state distribution[38]; the aims of social control rather than social justice in some relief programs [39] ; and the failure of the welfare state to forge a "commitment to emancipating the realm of production."[40] In short, there is a leftist tradition that views the welfare state as a source and site of unfreedom, as primarily a network of disciplinary power (a regime of social workers and case managers producing, distributing, and policing norms) or as a distraction from postcapitalist tomorrows and a deflection of the revolutionary fervor required to get us there. The *locus classicus* of the latter argument remains Marx's insistence that social democrats should be greeted with absolute "mistrust" as they hope to do nothing more than "bribe the workers" into accepting a mere "change of social conditions" and thus prevent a transformation of "the whole of society."[41]

These criticisms have been marginal in the broader conflicts over welfare in US political discourse. Historical waves of state repression and cultural 'red scares' silenced the Marxist critiques and left only isolated thinkers here and there in the academy or in small and mostly unread journals. The primary public debate has progressed along other lines: traditionally, the libertarians have claimed the mantle of "freedom" to argue against progressive schemes of taxation and redistribution. On this account, the freedom of the wealthy is unjustly violated by taxation and the freedom of the recipient of the entitlement is hobbled by dependency. By contrast, welfare state advocates have more often invoked values other than freedom such as a desire to "protect the weak"[42] or to ensure social stability[43] or to defend the principle of equality or to strengthen the bonds of citizenship[44] or to generate a humanitarian floor below which no citizen can fall. In some other instances, justification for the welfare state is rooted in the grammar of economics and technocracy. The current democratic-socialist candidate for President recently proposed universalizing Medicare on the grounds that the state, through economies of scale, is able to manage health care "more efficiently" than private industry.[45] However, at the most basic level, political disagreements have been normative rather than technocratic (although there is a certain neoliberal normativity in the appeal to the technocratic measure of efficiency), with individual freedom counterpoised to the equality of the welfare state.

One thing should be clear: the welfare state is neither necessarily synonymous with freedom nor freedom's singularly proper end,[46] but it is a mistake to render it *per se* alien, exterior, or antagonistic to freedom as matter of historical practice or theoretical principle. To open up our thinking, perhaps it might be useful to begin considering the question of freedom and welfare from the shores of the marginalized Left critiques. Indeed, the variety of critiques

themselves invites us to think of the welfare state from a number of different angles and thus further pluralize our understanding of emancipatory politics. Linked with a hesitation to speak of the Left in the singular, or in singular contradistinction to liberal politics, should be a hesitation to speak of the "welfare state" as a singular entity in the present with only one organizing principle. The latter is particularly important as the politics of the welfare state in the United States is too often thought exhausted by the politics of "welfare" for only the very poor.

Our judgment about the welfare state should be particularized, but one must move outward to see it in broader terms; we should recall that the US welfare state includes: Social Security Disability Insurance, socialized old-age pensions, socialized public education, Medicare coverage for the elderly, food stamps, TANF (Temporary Aid to Needy Families), Head Start pre-school programs, and a Medicaid program that now extends eligibility to adults earning up to 138% of the poverty line via the Affordable Care Act. By 2022, Medicaid could add over 20 million new enrollees.[47] All of these programs constitute the "welfare state" in the United States but they are reducible to no single political principle other than one: the collective right of democracy to govern the material conditions of "civil society" and the political right to establish new property rather than simply police extant forms.

The Affordable Care Act thus represents first and foremost the freedom of democracy over the prerogatives and presumptions of libertarian market freedom, an important reaffirmation of democracy in a period defined by its increasing fragility—as we witnessed in the jurisprudence of *Sebelius*.[48] But other freedoms are enabled too: a freedom of exit for workers (a freedom that in this instance moves both with and against central currents of Marxist thought) and a queer freedom from bio-familial normativity and dependency. Each now, in turn.

A. Wage work and freedom

The claim that "the Left has traditionally stood for a set of values and possibilities qualitatively different from those of welfare state liberals"[49] should be reconsidered when we take into account the extent to which the welfare state assists, or may assist, in freedom vis-a-vis "the realm of production." The welfare state helps to partially sever the dependency of the individual upon a particular employment relationship. It facilitates a partial breakage of the old iron-clad logic of survival under capitalist orders for the working class, "a class of labourers, who live only so long as they find work, and who find work only so long as their labour increases capital."[50] An acceleration in the de-linking of a social good and necessity from the power dynamics of the employer/employee relationship offers support for emancipatory political practices and projects with regard to the employer/employee relationship. As example, the Social Security program emancipates many from the requirements of wage labor during old age or injury without dooming them to ghastly poverty and misery. To illustrate: the percentage of Social Security recipients over the age of 65 in West Virginia who live in poverty is 9%; without Social Security it would be 52%. In Mississippi the poverty rate for that group is 12%; without Social Security it would be 55%; In Vermont the poverty rate for that group is 8.5%; without Social Security it would be 49%. [51] A workers' freedom of exit: a freedom to exit the obligation to labor in old age.

As Justice Ginsburg noted in *Sebelius*, the legislative aim of the Affordable Care Act was "the interest of those who labor." The ACA tends to the interest of workers as workers by defending and materially supporting a freedom of exit. There are at least two different dimensions of this freedom interest in this instance: the freedom to exit one job for another and the freedom to exit the wage-labor force in meaningful ways prior to old age. The expansion of Medicaid coupled with income-based subsidies for the purchase of insurance within regulated market exchanges empowers workers who are in a condition of "job lock." Job lock binds a worker to a particular job. Prior to the ACA many workers with employment-based insurance could not leave the job they held due to the fear of losing health insurance for themselves and their families. The potential loss of insurance was closer to fact than fear for those who had pre-existing health conditions. In response to this, the ACA forbids insurance companies from refusing coverage of preexisting conditions and socializes the cost within the insurance exchanges. Consequently, workers are now more free to exit their current employment arrangement than they were prior to the passage of the law.

Marxist theory has been more critical than appreciative of this freedom to exit. As Jon Elster has noted, Marxists have claimed that this particular freedom "tends to generate the illusion that the worker is free not only with respect to the individual capitalist, but with respect to capital as such."[52] However if capitalism is rendered conceptually and historically plural, then the particulars of this or that moment of capitalism are in fact "capital as such." The condition of job lock is a material unfreedom that recalls pre-capitalist feudal forms. To borrow from Faulkner, the past has never been entirely in the past in the present-tenses of capitalism. Karen Orren's exploration of the endurance of feudal practices and norms in US employment law well into the twentieth century highlights this fact. And it is noteworthy that Orren identified an entire apparatus around employment designed "in a manner to bind the worker to his job and ward off interlopers" that stood in contrast to the popular image of the "free labor calculating his day-to-day advantage, ready to pick up and follow the highest bidder."[53] Mobility is thus a freedom contra feudalism *and* contra capitalism when the former inhabits the latter as matter of practice, when practice refuses to yield to the dictates and demarcations of periodization. Additionally, such mobility must be defended as something other than an illusion to be discarded at some future moment of anti-/post-capitalist emancipation lest the freedom of the worker be entirely devoured by a collective "social power" that produces the conditions whereby the individual is immediately and inexorably conscripted into "industrial armies"[54] at the moment of freedom.

The rhetorical conflation of emancipation with the establishment of industrial armies by Marx and Engels signals continuity across the frontiers of capitalist norms into communist imaginaries: both place work at the center of life and the latter locates work at the center of freedom. As labor becomes the realization and signature of humanity, exit from labor (whether organized via the wage-labor system of capitalism or the socialized armies of labor of Marxism) as an act or precondition of freedom becomes suspect. Even when the Marxist tradition has envisioned emancipation from work and a life outside of it, it has done so in contradiction to its own theoretical premises. Hannah Arendt noted this contradiction in Marx's thought: "in all stages of his work he defines man as an *animal laborans* and then leads him into a society in which this greatest and most human power is no longer necessary."[55] In the twentieth century

the contradiction was resolved in favor of the "productivist imperative" in Marxism and two options emerged as dominant: "socialist modernization" which emphasized "more work," and "socialist humanism" which emphasized "better work."[56] Thus the worker in both the capitalist states and communist societies dwelled in the realm of labor and discovered that emancipation was contingent upon and coterminous with the normalization and internalization of a simple truth that there was no alternative to that realm. On all paths potentially leading somewhere else stood signs stating simply, "no exit." Worse, the normalization of the work imperative became so entrenched that it occurred to fewer and fewer to even seek out or contemplate such paths.

Understanding capitalist work structures to be at their heart ones of domination or exploitation (and for most who labor, both) and envisioning human beings as something other than *animal laborans* requires freedom to be re-conceptualized as unhinged from simply democratizing or revolutionizing the conditions of work even if and when freedom demands that revolution of democratization. Freedom requires less work and thus a criterion of judgment about the existence and expansion of the welfare state should be the extent to which it transforms that goal into a material reality. In the words of political theorist Kathi Weeks, the aim is "not for a liberation of work but a liberation *from* work."[57] Of course, one could be thrown out of work and into the teeth of bare existence and thus reminded of Marx's point that when survival is linked to laboring for a wage the absence of labor turns existence into a question. Indeed, a hallmark of neoliberalism has been the emergence of an economy bereft of full time, long-term employment and overflowing with short-term contracts providing minimal benefits; work precarity rather than labor monotony defines the neoliberal present and may be one reason that the call for emancipation from work currently lacks traction. Nonetheless, the task is to resist the impulse for a politics of herding people into labor (however "free") and instead to embrace contingency freed from the rule of hyperscarcity, competition, and anxiety.

As neoliberalism evacuates from public life social meanings, political vocabularies, and normative reference points other than those drawn from economics (including the concept of "public life" itself),[58] the pride of place once given to the "citizen" in liberal democracy has been increasingly supplanted by the model neoliberal actor, the postcitizen *par excellence*, the "entrepreneur." Perhaps ironically or perhaps as a measure of neoliberal hegemony, some politicians explicitly referenced the 'freeing' of the entrepreneur as a reason to support the ACA. After all, if job lock stymies risk then the inventor of the next magical technowidget may not pursue his or her creative impulses; in a sense, job lock does to the entrepreneur in the economic marketplace what J.S. Mill once worried "opinion" did to the speaker in the political marketplace: it changes the calculation about action and produces a stillness and quietude in the individual. Creative destruction thus compels the dissolution of the neofeudal bond within contemporary US capitalism even if that entails the expansion of the welfare state to accomplish it and even as a neoliberal discourse circulates around the expansion. Thus it is not surprising that the liberal Speaker of the House of Representatives who shepherded the ACA towards enactment said afterwards, "we see it as an entrepreneurial bill."[59]

One might be tempted to stop at this elevation of entrepreneurship and see in it an indictment of the limits of the legislation, the limits of the political discourse deployed to defend it, or the end of freedom beyond the contours of a neoliberal order in which "contemporary

neoliberal governance operates through isolating and entrepreneurializing responsible units and individuals."[60] Without discounting such possibilities, it still might behoove us to think more intently about how the ACA creates the possibility for some people to exit not just their particular job but the labor market entirely. Discursively, another figure appeared in the ACA debates as a potential alternative to the heroic entrepreneur: the artist. In the same moment she was praising entrepreneurship, Speaker Pelosi also defended the ACA as enabling "the pursuit of happiness" in other directions. She celebrated "people having the freedom to be self-employed, play music, write poetry, wherever their aspirations or talents take them."[61] Unsurprisingly, the political Right mocked and pilloried her for this justification.[62] Equally unsurprising but perhaps more disappointingly, some liberals insisted that the key point being made by Pelosi was an entrepreneurial one and that "Democrats are *not*, of course, proposing to provide some kind of welfare dole to individuals who wish to create art rather than work."[63]

Happily, Democrats did in fact create a welfare program that has enabled some number of individuals to leave the wage-labor market and create art. What some cite as a failure of the ACA should be revalued as a triumph: the ACA has reduced "the number of hours worked by the equivalent of 2.5 million jobs."[64] The ACA has been described as a "tremendous blessing" to actors, painters, poets, and musicians since "not having health insurance has long been part of the life of an artist, even though health problems can have a particularly debilitating effect on artists' careers."[65] The availability of socialized health insurance helps negate the necessity of choosing between performing unfulfilling work or living life as an artist. As numerous testimonials from artists illustrate, the ACA "makes it easier to carve out the time that makes it possible" be an artist.[66] One example among literally hundreds of thousands is Karin Abromaitis who at the age of 61 had received only eight years of employer-provided health care and had confronted a perpetual choice in life of selecting a job for insurance or opting out of wage labor to make ceramic bowls and teapots.[67] The ACA protects the second option as a viable one.

This freedom to exit the labor market, either entirely or in large measure, is more than a "bribe" to workers; it is a victory born of political democracy by workers for the right to be something other than workers. And while making art may be a form of work, it is also an activity of autonomy, leisure, and non-work. Karl Marx's son-in-law Paul Lafarge celebrated the vital space of life, art, and pleasure when he offered up garlands of praise to bestow upon "O, laziness, mother of the arts and the noble virtues."[68] The poet, actor, and musician appear today as strange subjects of freedom by contrast to the entrepreneur or the worker, but political theories and practices of freedom would be enriched by encouraging them to take the stage and taking the time to hear them perform without necessarily envisioning them as ideal or model human types or as freedom's vanguard subjects.

B. Family and freedom

Power at the site of production may be an object of Left politics, but the pluralization of emancipatory politics during the previous forty years has also multiplied the sites of political struggle and opened the doors to claims of justice and visions of political freedom not tied primarily to capitalism. As noted earlier, the pluralization of emancipatory visions has informed

the proliferating critiques of a variety of welfare state policies. But this can also be reversed: new political movements also provide new justifications for welfare state distributions that are not about emancipation from or within production.

An opening move of the democratic age involved disentangling the connected knots of a) one's particular place within the family b) the family's particular place in society and c) the familial society as coterminous with the political and social constitution. It is why Alexis de Tocqueville zeroed in on the abolition of primogeniture as the key to American democracy: a kind of equality was introduced into the family at the same time the family became less prominent as an actor in society. The family was not abolished but rather privatized. This left the 'individual' both more and less dependent upon the family: more dependent as the individual was now more isolated in the social world, and less dependent as the market society of competition engulfed the old society of inherited rule.[69]

Queer politics has long had to wrestle with this two-fold move of deepened and withdrawn dependency upon the family. Young people who do not conform to gender and/or sexuality norms often face abandonment and abuse by their biological (or adoptive) family, and thus queer politics involves crafting the social and material conditions of emancipation from the biological family. Cuts in welfare state programs disproportionately impact queer youth, as queer youth are disproportionately without familial support: one rough measurement estimates that 10% of youth are LGBT, but LGBT youth constitute 20% of homeless youth in the nation because "their parents or other family was unaccepting of their sexuality or because of abuse."[70] So, the gap between family and market during the period between childhood and adulthood is one that the welfare state should work to fill. Establishing universal access to health care opens the future to many queer youth and cuts the chain of dependency to hostile families.

Important components of the US welfare state have both presumed and reinforced a heteropatriarchal order. The welfare state has often been imagined as necessary only as a "safety net" when privatized care systems fail catastrophically. As a result, heterosexually gendered divisions of care/market (with only the latter afforded the dignity of "work") and public/private (with only the former designated as the proper realm for "freedom") have become the norm while welfare state provision figures as the exception. Such an order privileges the heterosexual biological reproductive couple at the same time it masks both the domination within that unit and the dependent relationship that the "market" and "public realm" have upon those naturalized demarcations and inequalities.[71] Married women who labor in the home receive no wage from either the market or the state, but widows may be entitled to meager subsidies from the state. Even today there remains not only a presumption of privatized care but also the conjunction of care with the reproductive bond. Anna Marie Smith describes the 1996 neoliberal welfare reform engineered under the rubric of common sense and consensus politics as "paternafare":

> the State is broadcasting the message that a mere biological tie constitutes a sufficient basis for fatherhood, that women with children should be dependent upon the children's father, and that the father ought to provide for the children. The idea that the biological father is the appropriate source of material support for children

> carries with it, in our bourgeois context, an implicit presumption: the one who pays is the one who should govern.[72]

The welfare state can either buttress the one who governs or facilitate self-government for those who have historically been governed. It is an issue for political contestation.

The Affordable Care Act makes important, if halting and still incomplete, contributions to self-government by socializing health insurance. One particular component of the ACA rejects the normative thrust of paternafare and offers one possible vision for queering the family and the state: the expansion of Medicaid to those who graduate out of foster care. Queer kids are overly represented in the foster care system,[73] but even self-identified straight kids in foster care are in a queer relation to the normativity of the biological family. There are over 400,000 youth living in foster care in the United States and they lack the familial connection to access the ACA provision that allows parents to extend coverage to their children until the age of 26. The ACA created a "parallel provision" that grants Medicaid coverage to those who leave foster care at age 18 and covers them until the age of 26. Importantly, Medicaid will be provided to this group even if their income exceeds the normal income limit imposed on Medicaid and the law makes no requirement that they track down their biological family prior to or after receiving the benefit (in contrast to "paternafare").[74]

The welfare state is never without norms, but its disciplinary mechanisms may be both loosened and redirected towards queerer understandings of freedom. Almost unnoticed, the ACA has done more for queer emancipation than any other contemporary federal government program or provision.[75] While the mainstream LGBT-rights organizations have embraced the ideal of middle class normality, the material lives of many suffer from orders of distribution and entitlement that do not match the realities of their lives. The ACA is but a step in closing the gap. Consequently, there is no possibility for a queer politics of freedom without resistance to neoliberalism and its relentless logic of ahistorical and decontextualized individualism. It is why the queer Left has been attentive to the catastrophe of neoliberalism when so many others have heard only wedding bells.

4. Conclusion

The passage of the Affordable Care Act marks an important challenge to the policies and logics of neoliberalism. In writing as a friend of the law, however, I do not intend to suggest that the statute is without failures, omissions, or exclusions: its exclusions of the undocumented is a crime in xenophobic times, its continuation of the Hyde Amendment's prohibition of federal monies for abortion is in contradiction to the meaning (even if not the current jurisprudence) of equal protection of the laws, and its fragmentation of distribution weakens basic principles of solidarity. But the vices of the law are not necessarily born from its many virtues and, indeed, the latter may well provide cure for the former. As example, the exclusion produced by the Hyde Amendment is cognizable only because of the existence of the Medicaid program, and the repair of the injury both presumes and demands the public distribution or subsidy of health care.

This is inclusion born of socialized material expansion rather than liberal inclusion into a right of competition, inequality, and market-based reward.

Any reading of the ACA must take note of its flaws, but those flaws should not blot out the ways in which the law potentially abolishes job lock and unbinds opportunities in life from the inheritances of the biological family. And more generally, Justice Ginsburg's eloquent reminder that the welfare state can be the assertion of democracy's primacy over the so-called "market" by those who labor in it should today compel a reconsideration of the theoretical bifurcation witnessed in multiple traditions of political thought between "welfare" and "freedom."

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Notes

1. See Tony Judt, *Ill Fares the Land* (New York: Penguin Books, 2010).

2. On lawlessness, see Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Picador, 2007), 305: "the movement that Milton Friedman launched in the 1950s is best understood as an attempt by multinational capital to recapture the highly profitable, lawless frontier that Adam Smith so admired . . . this movement set out to systematically dismantle existing laws and regulations to recreate that earlier lawlessness." On instrumental ends, see Owen Fiss, "The Autonomy of Law," *Yale Journal of International Law* (2001), 518: "The proponents of neoliberalism have sought to forge a link between that development policy and law . . . one is tempted to believe that there are two parts of the Washington Consensus---neoliberalism and the rule of law."

3. According to David Harvey: "neoliberalism has, in short, become hegemonic as a mode of discourse." David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 3.

4. See Wendy Brown, “Neoliberalism and the End of Liberal Democracy,” in *Edgework: Critical Essays on Knowledge and Politics* (Princeton: Princeton University Press, 2005) 37–60.

5. Adam Liptak, “Corporations Find a Friend in the Supreme Court,” *New York Times*, May 13, 2013.

6. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

7. This remains the central *constitutional* case involving the Affordable Care Act. In the *Hobby Lobby* case (2014), the Supreme Court limited the contraception mandate on the *legislative* grounds of the Religious Freedom Restoration Act, refusing to reach the First Amendment issue raised by the plaintiffs. More recently in *Burwell v. Harris* (2015), the Court read the ACA statute in a manner that preserved federal subsidies, but again this was a question of statutory interpretation that raised no significant constitutional issues.

8. Harvey, *A Brief History*, 3. But welfare reform that cuts social spending may also constitute an *extension* of state power along disciplinary lines. See generally Anna Marie Smith, *Welfare Reform and Sexual Regulation* (Cambridge: Cambridge University Press, 2007).

9. “Medicaid Expansion Under The Affordable Care Act,” *Journal of the American Medical Association*, 309:12 (2013): 1219.

10. Roberto Mangabeira Unger, *Democracy Realized: The Progressive Alternative* (London: Verso Press, 1998) 53. Unger argues that “institutionally conservative social democracy become[s] an integral part of the neoliberal vision” p. 54. However, it is not clear how this alleged incorporation of social democracy into neoliberalism squares with Unger’s claim that neoliberalism is defined, in part, by “privatization” and “cuts in public spending” p. 57. A privatized and underfunded safety net is no longer a safety net; it is, instead, a triumph of neoliberal principle and policy. Thus, social democracy cannot be properly said to be an “integral part of the neoliberal vision.”

11. The original statute permitted withholding *all* Federal Medicaid funds to noncomplying States; now the Federal government can only refuse the *new* Medicaid funds. The law as written would have almost certainly generated compliance and an almost immediate nationwide expansion if the Court had not limited the enforcement mechanism. Absent the legislative stick, many States with right-wing governments are simply refusing the carrot. As is, the States are moving haltingly in expanding Medicaid with many rejecting expansion on a purely political basis as it is difficult to construct a persuasive ‘economic’ rationalization for the refusal.

12. On the Commerce Clause, Justice Ginsburg was joined by Justices Kagan, Sotomayor, and Breyer; only Justice Sotomayor joined in the Spending Clause portion of Justice Ginsburg’s opinion.

13. *Lochner v. New York*, 198 U.S. 45 (1905).

14. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

15. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

16. See *Wickard v. Filburn.*, 317 U.S. 111 (1942).

17. *N.F.I.B. v. Sebelius*, 132 S. Ct. 2566, 2616 (2012).

18. *N.F.I.B v. Sebelius*, 132 S. Ct. 2566, 2628 (2012).

19. 132 S. Ct. 2566, 2609 (2012).

20. *Reynolds v. Sims*, 377 U.S. 533 (1964).

21. Contrast with the French *Declaration of Rights of Man* (1789).

22. The *Declaration of Independence* (1776) itemizes the tyranny of the King against political life: "He has refused his Assent to Laws, the most wholesome and necessary for the public good . . . He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only. He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures." This is but a sample of the indictment.

23. Karl Marx, "On the Jewish Question" (1843).

24. See Mark Tushnet, "An Essay on Rights," *Texas Law Review*, 62:1363 (1984).

25. Milton Friedman's gruff comment that "the believer of freedom has never counted noses" was aimed at deep-seated democratic support for Social Security in the United States. Milton Friedman, *Capitalism and Freedom: Fortieth Anniversary Edition* (Chicago: University of Chicago Press, 2002), 9. As has been widely noted, neoliberalism in theory and in practice has been "profoundly suspicious of democracy." Harvey, *A Brief History*, 66. See also *The Battle of Chile*, directed by Patricio Guzman (1975, 1976, 1979).

26. I set forth this argument more fully at Jack Jackson, "A Reply to Nimer Sultany," www.harvardcrcl.org/sultanycolloquium (2012). See also Sanford Levinson, *Our Undemocratic Constitution* (Oxford: Oxford University Press, 2006).

27. Friedman, *Capitalism and Freedom*, 2–3.

28. 132 S. Ct. 2566, 2677 (2012).

29. The Constitution "enumerates not federally solvable problems, but federally available powers." Ibid.

30. 132 S. Ct. 2566, 2648 (2012).

31. Ibid.

32. To be clear, Friedman's plan to "cure" the ills of the U.S. health care system includes terminating *both* Medicare and Medicaid. Milton Friedman, "How to Cure Health Care," *Hoover Digest* 3 (2001).

33. Brown, *Edgework*, 43. See also, Paul Passavant, "The Strong Neo-Liberal State: Crime, Consumption, and Governance," *Theory & Event*, 8:3 (2005).

34. "Empowering the People: The Privatization of Social Security in Chile," Jose Pinera, Testimony before the Subcommittee on Social Security, House Ways and Means Committee, September 18, 1997 [emphasis added].

35. 132 S. Ct. 2566 (2012).

36. Jamie Peck, *Constructions of Neoliberal Reason* (Oxford: Oxford University Press, 2010), 20.

37. See Jill Quadagno, "Welfare Capitalism and the Social Security Act of 1935," *American Sociological Review* 49:5 (1984) (3/5 of all black workers were employed in excluded categories under the unemployment provision and old age insurance of the 1935 act).

38. See Linda Gordon, "Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1890–1935, *American Historical Review* 97:1 (1992) (norm of male breadwinner became embedded in the welfare state).

39. See Francis Fox Piven and Richard Clower, *Regulating the Poor: The Functions of Public Welfare, 2d edition* (New York: Vintage, 1993).

40. Wendy Brown, *Edgework*, 55.

41. Karl Marx, "Address to the Central Committee of the Communist League" (1850).

42. Robert Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton: Princeton University Press 1988), x.

43. Desmond King and Fiona Ross, "Critics and Beyond," in Francis G. Castles, et. al., Eds. *The Oxford Handbook of the Welfare State* (Oxford: Oxford University Press, 2010) 49.

44. T.H. Marshall, "Citizenship and Social Class," in *Class, Citizenship, and Social Development* (New York: Anchor Books, 1965).

45. See issue paper on the candidate's official cite at https://berniesanders.com posted as Richard Eskow, "5 Reasons We Need Medicare for All," July 21, 2015.

46. This notion often lurks in the idea of the 'end of ideology.'

47. "Medicaid Expansion Under The Affordable Care Act," *Journal of the American Medical Association*, 309:12 (2013): 1219.

48. See more generally, Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015).

49. Brown, *Edgework*, 55. I agree with Brown that the idea of "continuum" does not help us to think of diverging and converging political projects. Following that, it might be worth prying apart the indivisibility of the welfare state and the "liberal perspective." Is the socialization of education and old age pensions really the same as "a liberal commitment to rights based equality" and "civil liberties"? Brown, p. 55. It concerns me that this collapse has turned the possibility of a "welfare-state left" into an impossible contradiction, mirroring in some way the effort by Milton Friedman to transform democratic socialism into unfreedom's apogee.

50. Karl Marx and Frederick Engels, *The Manifesto of the Communist Party* (1848). Of course, the *Manifesto* called forth a future quite different from that of the contemporary welfare state. My aim is only to think sympathetically with Marx about the conditions that called forth the *Manifesto*.

51. *AARP Bulletin*, 54:2 (2013): 36 (the study is by the Center on Budget and Policy Priorities).

52. Jon Elster, "Exploitation, Freedom, and Justice" in J. Roland Pennock and John W. Chapman, Eds. *Marxism: Nomos XXVI* (New York: NYU Press, 1983) 284.

53. Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991) 13.

54. From *The Communist Manifesto* (1848): "in the most advanced countries, the following will be pretty generally applicable: . . . Establishment of industrial armies, especially for agriculture."

55. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998 [1958]) 105. Arendt describes this as the "fundamental contradiction" in Marx's thought.

56. Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Durham, NC: Duke University Press, 2011) 81–83.

57. Ibid., 97 (emphasis added). Weeks notes that "fundamental to the refusal of work as analysis and strategy is a definition of capitalism that highlights not the institution of private property, but rather the imposition and organization of work." p. 97.

58. For an illuminating diagnosis of this phenomena, see generally Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015).

59. Jonathan Chait, “Stalin, Mao, Kristol,” in *The New Republic*, March 24, 2010 [blog last viewed on June 15, 2015].

60. Brown, *Undoing the Demos*, 129.

61. KQED interview: Jon Brooks, “Pelosi on Health Care Mandate: ‘Goodbye to the Free Riders’; Interview with Scott Shafer,” June 28, 2012 (www.kqed.org).

62. As example, see Jonah Goldberg, “Freedom for the Job-Locked: Dems’ Desperate Defense of Obama-induced Unemployment,” *National Review*, February 7, 2014.

63. Jonathan Chait, “Stalin, Mao, Kristol,” in *The New Republic*, March 24, 2010 [emphasis in original; blog last viewed on June 15, 2015].

64. Congressional Budget Office, “Labor Market Effects of the Affordable Care Act: Updated Estimates,” February 2014.

65. Soumya Karlamangla, “Actors, Musicians are Big Beneficiaries of Obamacare,” *Los Angeles Times*, May 23, 2014.

66. Alyssa Rosenberg, “Why the Affordable Care Act Matters to Artists,” *ThinkProgress*, October 2, 2013.

67. Paige Cunningham, “Artists Benefit from Obamacare,” *Politico*, March 31, 2014.

68. Quoted in Kathi Weeks, *The Problem with Work*, 98.

69. The privatized character of the family also produced the confinement of (white) women within the sphere of domestic labor. Women’s “independence is irretrievably lost” in the confines of the domestic realm Tocqueville rightly observed; yet he strangely called this a source of “happiness” to those so confined. *Democracy in America*, Vol. II, pt. 3, ch. 10.

70. This estimate is provided by the National Alliance to End Homelessness. See also, Martha Fineman, “Vulnerability, Resilience, and LGBT Youth,” *Temple Political & Civil Rights Law Review*, 23:2 (2014): 322–325.

71. For a rich exploration and critique of this regime in conjunction with thought-provoking alternatives to it, see generally Martha Fineman *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995) and Joan Tronto, *Caring Democracy: Markets, Equality, and Justice* (New York: NYU Press, 2013).

72. Anna Marie Smith, *Welfare Reform and Sexual Regulation* (Cambridge: Cambridge University Press 2007) 49.

73. Bianca D.M. Wilson, et. al., “Sexual and Gender Minority Youth in Los Angeles Foster Care,” report from *The Williams Institute at UCLA*, August 2014.

74. Brooke Lehmann, et. al., “Child Welfare and the Affordable Care Act: Key Provisions for Foster Care Children and Youth,” report from *The Center for Children and Families at Georgetown University*, June 2012.

75. Both in terms of its redistributive effects and its non-discrimination provisions.